In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 951

JAMES C. HAWKINS AND RAYMOND MELVIN SHELBY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were jointly tried and convicted by a jury in the United States District Court for the Eastern District of Texas of conspiring to pass and passing forged postal money orders in violation of 18 U.S.C. 371 and 500. Each was given concurrent sentences of imprisonment for five years. The court of appeals affirmed the convictions (Pet. App. 9-14). Petitioners do not question the sufficiency of the evidence, which is summarized in the opinion of the court below (Pet. App. 10).

1. Petitioner Hawkins alleges he was denied due process during the trial when testimony showing him to be a violent man was allowed into evidence. A government witness, Diane Hazelbrook, who had been living with Hawkins, testified as to the delivery of credit cards by Hawkins to the others involved in the venture (Tr. 527-528). In cross-examining her, counsel for Hawkins attempted to establish that she was prejudiced against Hawkins by showing that she had filed and then withdrawn a criminal complaint against him (Tr. 547-551). On re-direct, government counsel, without objection, elicited testimony from the witness as to the reason she had dropped the complaint. The witness testified that petitioner had beaten her so severely she was under a doctor's care for three weeks, and that she dropped the complaint because she was afraid of him (Tr. 552-555; Pet. App. C).

The defense counsel opened the door to these questions by attempting to impeach the witness's testimony on grounds of animosity toward petitioner Hawkins. The government was then entitled to show that the complaint was not motivated by personal animosity, but had a sound basis in fact, even though the explanation showed petitioner to be a man of violent character. *Beck* v. *United States*, 317 F. 2d 865 (C.A. 5), certiorari denied, 375 U.S. 972; *Bracey* v. *United States*, 142 F. 2d 85 (C.A.D.C.), certiorari denied, 322 U.S. 762. Defense counsel interposed no objection to the witness's testimony, and, in fact, on re-cross delved further into the matter by inquiring why she went back to work for petitioner if she was afraid of him (Tr. 556-558).

2. Petitioner Shelby, who unlike Hawkins took the stand, alleges he was denied due process because government counsel asked him, without objection, if he had made an agreement with his co-defendant Hawkins to "take a fall for him" (Tr. 643-644). Prior to this petitioner Shelby had attempted to absolve Hawkins by testifying that Hawkins was not involved in the criminal scheme (Tr. 579). He then testified that he was involved in unlawful agreement with someone else and proceeded to make numerous admissions of guilt. He testified that he had driven the car while an associate passed forged money orders (Tr. 641-642); that he had known the money orders were forged (Tr. 603-605); and that he had received 25 percent of the proceeds as his share (Tr. 600).

In his closing argument government counsel, without objection, referred to petitioner Shelby as a "fall guy" and told the jury it could draw its own conclusions as to why he would take the stand and admit all that he had (Tr. 678). As the court of appeals stated, "[u]nder the evidence the jury was entitled to conclude that Shelby was in fact what was referred to as a 'fall guy' for Hawkins" (Pet. App. 14). Thus, neither the question nor the argument of government counsel constituted prejudicial error.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 373583 435